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MAYOR

CITY OF SALEM, MASSACHUSETTS
BOARD OF APPEALS

2019 MAY -1 PM 3:45

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CITY CLERK
SALEM, MASS

May 1, 2019

Decision

City of Salem Board of Appeals

Petition of LIANN DIMARE for a special permit per Section 15-6 (d) of the Salem Code of Ordinances to allow the continued operation of one non-owner occupied short-term rental unit in the two-family house at 82 FEDERAL STREET (Map 26, Lot 631) (R2 Zoning District).

A public hearing on the above Petition was opened on February 20, 2019 pursuant to M.G.L Ch. 40A, § 11, continued to March 20, 2019, continued to April 17, 2019, and closed on April 17, 2019 with the following Salem Board of Appeals members present: Mike Duffy (Chair), Jimmi Heiserman, Jimmy Tsitsinos, and Paul Viccica. Peter A. Copelas and Paul Viccica were present at the February 20, 2019 and March 20, 2019 public hearings but were not present and did not vote at the April 17, 2019 hearing. As noted below, Jimmi Heiserman and Jimmy Tsitsinos were absent at the February 20, 2019 hearing but present at the March and April hearings; they both affirmed that they examined all evidence pertaining to this petition prior to participating in the vote to continue at the March 20, 2019 hearing.

The Petitioner seeks a special permit per Section 15-6 (d) of the Salem Code of Ordinances to allow the continued operation of one non-owner occupied short-term rental unit. 82 Federal Street is a two-family house in which one unit (Unit #2) has been used as a non-owner occupied short-term rental unit. The Petitioner is seeking to continue this use by special permit, per the procedure set forth in Section 15-6 (d) of the Salem Code of Ordinances.

Statements of Fact:

1. In the petition date-stamped January 14, 2019, the Petitioner requested a special permit per Section 15-6 (d) of the Salem Code of Ordinances to allow the continued operation of one non-owner occupied short-term rental unit. 82 Federal Street is a two-family house in which one unit (Unit #2) has been used as a non-owner occupied short-term rental unit. The Petitioner is seeking to continue this use by special permit, per the procedure set forth in Section 15-6 (d) of the Salem Code of Ordinances.
2. Petitioner Liann DiMare presented the petition.
3. The property is a two-family house located in the Residential Two-Family (R2) Zoning District.
4. Chapter 15 of the Salem Code of Ordinances, *Short-Term Rentals*, was enacted by an amendment to the Code of Ordinances that was approved by the Mayor on October 1, 2018. Section 15-6 sets forth *Requirements for Short-Term Rentals*. Section 15-6 (d) *Short-Term Rental of a Non-Owner Occupied Unit* states, in relevant part, that "An Operator may use his or her Non-Owner Occupied Unit as a Short-Term Rental only if the Operator was engaged in the Short-Term Rental of the property as of the date this Ordinance was filed with the Council and provided that the Operator obtains a Special Permit from the Zoning Board of Appeals." The same Section states that "Qualifying Operators must petition for

- a Special Permit within 60 days of the date of passage of this Ordinance in order to be eligible for this exception.”
5. The ordinance allowing short-term residential rentals in the City of Salem was filed with the City Clerk on July 16, 2018.
 6. The property was not rented as a non-owner occupied short-term rental unit prior to July 16, 2018. The petitioner included with the application a Short Term Transient Rental Property Management Agreement between Wendy Samuels and iTrip North Shore, for 82 Federal Street Apartment 2, with an effective date of June 7, 2018. The owner of the property is Wendy Samuels; the authorized petitioner, Liann DiMare, is the President of iTrip North Shore, the property management organization. This document expresses the agreement between the property owner and iTrip North Shore for iTrip North Shore to manage and rent the unit, 82 Federal Street Apartment 2, “on a short-term transient (Daily/Weekly/Monthly) basis.”
 7. As the above amendment was approved by the Mayor on October 1, 2018, the deadline for Qualifying Operators to petition for Special Permit was initially understood to be December 1, 2018.
 8. An Ordinance to amend the Salem Zoning Ordinance to add the use “non-owner occupied short-term rentals” to Section 3.0 Table of Principal and Accessory Use Regulations and to add definitions for “non-owner occupied short-term rental” and “short-term rental” to Section 10.0 Definitions was, however, adopted for second and final passage by the City Council on November 15, 2018.
 9. In light of the foregoing, in January of 2019, following consultation with the Assistant City Solicitor, Victoria Caldwell, a final deadline of January 15, 2019 was established for the aforementioned “Qualifying Operators.” This deadline was 60 days from the date of passage of the aforementioned Zoning Ordinance.
 10. Several parties contacted the City for information on the special permit process for non-owner occupied short-term rentals in October of 2018. However, the City did not inform these parties about the special permit process until December 6, 2018, after the original understood deadline of December 1, 2018 had passed. In consultation with Victoria Caldwell, Zoning Enforcement Officer Tom St. Pierre and Staff Planner Brennan Corrison, and consistent with the establishment of a final deadline of January 15, 2019 following the City Council’s vote on November 15, 2018, it was determined that these parties should not be denied the opportunity to seek a special permit and that their Petitions would be deemed timely under Section 15-6 (d).
 11. Petitioner Liann DiMare submitted the petition per the process outlined in Section 15-6 (d) of the Salem Code of Ordinances. This petition was submitted January 14, 2019, prior to the January 15, 2019 deadline.
 12. Section 3.0 *Table of Principal and Accessory Uses* of the Salem Zoning Ordinance was amended in 2018 to include the new use of “Non-Owner Occupied Short-Term Rentals.” Non-Owner Occupied Short-Term Rentals are allowed by special permit from the Zoning Board of Appeals in the following Zoning Districts:
 - Residential Two-Family (R2);
 - Residential Multifamily (R3);
 - Business Neighborhood (B1);
 - Business Highway (B2);
 - Business Wholesale & Automotive (B4);
 - Central Development (B5).

13. As noted above, the property is located in the Residential Two-Family (R2) zoning district. The Non-Owner Occupied Short-Term Rentals use is allowed by special permit from the Zoning Board of Appeals in this district.
14. The requested relief, if granted, would allow the Petitioner to continue to operate one unit (Unit #2) in the two-family house at 82 Federal Street as one non-owner occupied short-term rental unit.
15. At the February 20, 2019 public hearing, the petitioner, Liann DiMare, discussed the petition. She explained that 82 Federal Street Unit 2 is a six-bedroom, two-bathroom unit on two floors (the second and third floors) in a two-family house. Ms. DiMare noted that a contract was signed in June 2018. Ms. DiMare stated that she checked with the Mayor's Office to find out whether the use would be considered grandfathered with that date and that they were told yes. As such, Ms. DiMare stated, the applicant and property owner proceeded to furnish the unit and started accepting short-term rentals in late August 2018. Ms. DiMare stated that they have had many five-star reviews, and that the neighbors have her contact information. Ms. DiMare stated that the first floor of the building has full-time residents who have her phone number, and that they have had no complaints.
16. Zoning Enforcement Officer and Building Commissioner Tom St. Pierre stated that a zoning opinion needs to come from the Zoning Enforcement Officer, not the Mayor's Office, because the Zoning Enforcement Officer can be appealed. Mr. St. Pierre stated that information (regarding zoning) from others is not necessarily accurate or legally sustainable. Ms. DiMare stated that they went to the source of the ordinance to say, "How do we interpret this?" She stated that with this information, they proceeded to spend money in furnishing and refurbishing the property.
17. Board member Peter Copelas asked Staff Planner Brennan Corrison for the exact language of the ordinance regarding the date. Mr. Corrison read from his reproduction of Section 15-6 *Requirements for short-term rentals* (d) *Short-term rental of a non-owner occupied unit*: "An operator may use his or her non-owner occupied unit as a short-term rental only if the operator was engaged in the short-term rental of the property as of the date this ordinance was filed with the council and provided that the operator obtains a special permit from the zoning board of appeals. Qualifying operators must petition for a special permit within 60 days of the date of passage of this ordinance in order to be eligible for this exception. Rentals of non-owner occupied units must be for the entire unit; individual rooms within non-owner occupied units may not be offered as separate short-term rentals. Non-owner occupied units used for short-term rental under this subsection shall be subject to section 36-6 of the ordinance and required to pay a trash fee, but shall not be eligible for a vacancy waiver pursuant to section 36-6 d."
18. Board member Paul Viccica stated that the gist of the ordinance is to grandfather those properties that have been in active agreements for use for short-term rental prior to that date. Ms. DiMare stated that she did have an active agreement. Mr. Copelas stated that there is a contract, but it was not being used for short-term rentals. Ms. DiMare stated that they had work to do to get the unit ready, which happened from June to mid-August. She stated that they would not have proceeded (if not available).
19. There was a question of the definition of "engaged." Mr. Corrison that this might be a situation where the Board defers to the Solicitor's Office for an opinion. Mr. Viccica stated that he thinks the Board has to (do so). Mr. Viccica stated that from his perspective, the point of grandfathering something is that it is in operation so that things that occur over time can be experienced by the neighbors. He stated that he would rather have the Solicitor discuss the intent of the Ordinance than parse the petitioner's language against anybody else's language. He suggested that the petition be continued to the next meeting so the Board could get guidance from the City Solicitor.

20. Mr. St. Pierre noted that Assistant City Solicitor Victoria Caldwell worked on the ordinance, so the question would be directed to her. Mr. Copelas added that the Board would request an opinion from Assistant City Solicitor Caldwell.
21. At the February 20, 2019 public hearing, no (0) members of the public spoke in favor of the petition and two (2) members of the public spoke in opposition. One other (1) member of the public, Jeff Cohen, stated that he believed it was important that the Assistant City Solicitor issues an opinion. He discussed his understanding of the intent of the timing of elements of the Ordinance. It was not clear whether he was in favor or in opposition to the petition. Chair Duffy noted that the Board received a letter in opposition to this petition and others from Flora Tonthat.
22. At the February 20, 2019 public hearing, Mr. Copelas asked if the petitioner would accept a request to continue; the petitioner responded in the affirmative. At this hearing, the Board voted four (4) in favor (Patrick Shea, Mike Duffy, Paul Viccica, and Peter A. Copelas) and none (0) opposed to continue the petition to the regularly scheduled meeting on March 20, 2019.
23. The petitioner retained an attorney, Peter G. Calabrese. On March 12, 2019, Attorney Calabrese submitted a memorandum in support of this special permit application to the Board. Attorney Calabrese noted at this time that he did not yet have documented evidence in support of the application (which was referenced in the memorandum), but that Ms. DiMare would be happy to continue the hearing from the March meeting to the April meeting; otherwise, he would bring the evidence to the March hearing. Staff Planner Brennan Corrison recommended that Mr. Calabrese request to continue the petitions to April to give the Board sufficient time to review the evidence.
24. Board members Jimmi Heiserman and Jimmy Tsitsinos, who were absent at the February 20, 2019 hearing of this petition, signed affidavits of service on March 20, 2019, certifying that they examined all evidence pertaining to 82 Federal Street which was distributed at the single missed session on February 20, 2019, which evidence included an audio recording of the missed session. They submitted these certifications prior to participating in the vote to continue the matter to the April 17, 2019 public hearing.
25. At the March 20, 2019 meeting of the Zoning Board of Appeals, the Board voted five (5) in favor (Mike Duffy (Chair), Jimmi Heiserman, Patrick Shea, Jimmy Tsitsinos, and Peter A. Copelas) and none (0) opposed to continue the petition to the regularly scheduled meeting on April 17, 2019.
26. Prior to the April 17, 2019 meeting, Attorney Calabrese submitted the above-referenced evidence in support of the special permit application.
27. Assistant City Solicitor Victoria Caldwell sent a memorandum to the Board of Appeals dated March 15, 2019, in which she responded to the Board's questions about the meaning of the phrase "engaged in the Short-Term Rental of the property as of the date this Ordinance was filed" and whether the "language requires actual rentals prior to the filing date," or if "a signed short-term rental property management agreement indicating intent to operate a short-term rental (signed prior to the filing date)" would be sufficient. In this opinion, Assistant City Solicitor Caldwell stated, "As there is no definition contained in the Ordinance, the Board of Appeals is free to exercise its discretion to determine what evidence it will require to find that a petitioner was 'engaged in the Short-Term Rental of the property' as of the date the Ordinance was filed. Although the Board may choose to require proof that a property had been listed as a short-term rental and/or previously rented out as a short-term rental in order to qualify under the grandfathering provisions, the Board could also determine that proof such as a signed short-term rental property agreement is sufficient to establish eligibility for grandfathered status. Either way, the Board's decision should include a finding that the petitioner was

- or was not ‘engaged in the Short-Term Rental of the property’ as of the date the Ordinance was filed.”
28. At the April 17, 2019 meeting, Attorney Peter Calabrese discussed the petition and the Statement of Grounds criteria.
 29. Attorney Calabrese stated that they submit that the non-owner occupied short-term rental use was “engaged” prior to the filing date; that this was a use begun prior to the enactment of the ordinance. He noted that the City Solicitor has written an opinion on this question. Attorney Calabrese stated that there is case law on what engaged and pre-existing use mean. He stated that there are clearly planning steps taken in advance of the ordinance and monetary investment to make the property suitable for this use; he stated that these are necessary steps for the final step of the use, which is to have visitors in the apartment. Attorney Calabrese cited the case *Janes v. Board of Appeals of Essex* in which, he stated, steps towards making a building a multi-family use were sufficient for the Court of Appeals to determine that this was a prior, nonconforming use within MGL Ch. 40A § 6.
 30. Chair Duffy stated that the issue is whether this use was “engaged.”
 31. Attorney Calabrese discussed Chapter 40A, § 6 of the Massachusetts General Laws. He stated that the basic premise of the grandfathering statute is: if someone relies on a law and takes steps that are lawful, you cannot later make that action unlawful.
 32. Chair Duffy asked the petitioner to discuss the work that was undertaken to prepare for the rentals. Ms. DiMare stated that they made repairs to the wallpaper and the bathroom on the second floor. She added that there was significant investment in furnishings, which is not normally done for a long-term tenant: they bought beds, bedroom sets, and living room sets. Ms. DiMare stated that between when the contract was signed and the first discussion of regulations on short-term rentals, there was significant investment. She stated that putting tenants into a property like this would ruin it.
 33. Mr. Viccica asked when the repairs started. Ms. DiMare stated the contract was signed June 7 (2018) and repairs started the next day.
 34. Attorney Calabrese stated that, when it comes to pre-existing nonconforming uses, the case law shows that you look at the entire lifespan of the use including the work leading up to people living in a space. Attorney Calabrese quoted (from the *Janes* case): “conceived of, prepared, and planned.”
 35. Mr. Viccica noted that the Board asked the City attorney for information, and that she did not weigh in on what engaged means, and that the Zoning Board would have to establish it. Mr. Viccica asked the petitioner, “Why do you think she did not define it [the meaning of engaged]?”
 36. Attorney Calabrese stated that they include the *Janes* case because it answers the precise question before the Board. The question is when does the use start, and the case states that it is at the conceiving, planning, and preparation stage. He stated that this is not an abstract concept; they have physical action and furtherance, and the Board can verify the timing. He stated that you have someone who invested and entered into a contract under the current state of the law. He referenced the *Janes* case in more detail, comparing it to the instant case.
 37. Board member Jimmi Heiserman asked when the rental was first listed on Airbnb. Ms. DiMare stated it was first listed in late August of 2018.
 38. Mr. Viccica stated that his suggestion would be to ask the City Solicitor whether the petitioner and representative’s argument makes sense.

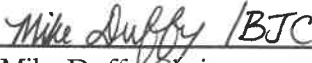
39. Chair Duffy stated that it is the City Solicitor's job to advise the Board on legal issues. He stated that there is a gradient of activity: it is not someone's mental cognition that triggers the use; there has to be enough activity undertaken. He states that he thinks that is the question right now.
40. Attorney Calabrese responds that this is why they are providing a contract execution, spending of funds, and physical construction work that is finished.
41. At the April 17, 2019 public hearing, no (0) members of the public spoke in favor of the petition and ten (10) members of the public spoke in opposition to the petition. Jane Arlander of 93 Federal Street noted that she submitted a petition in opposition signed by forty-two (42) neighbors in or near the Federal Street area. This petition was accompanied by a letter explaining the reasons for opposition. Chair Duffy noted for the record that he received this letter and that Dr. Arlander spoke to most of the points addressed in the letter; Chair Duffy noted that there was the petition attached with approximately forty signatures, and a list of the signing parties. Mr. Corriston noted that they received an additional two signatures which have been added to the project file. Connie Arlander presented a letter from Jim McAllister in opposition to the special permit; this was added to the project file. At the end of the hearing, Mr. Corriston noted that there was a letter in support of the petition submitted by Melissa Nierman, owner of a business at 144 Washington Street, through the petitioner; he read this letter into the record.
42. As noted above, the letter submitted by Jane Arlander on behalf of the neighbors who signed this petition expressed the reasons for opposition. Some of the reasons for opposition were presented in relation to special permit criteria. Quotations below are from the letter submitted by Jane Arlander.
 - "We do not believe that a non-owner occupied short-term rental unit at 82 Federal Street provides the current social, economic and community needs required for a Special Permit. The City of Salem is currently confronting with an affordable housing crisis. By eliminating a family residential unit on Federal Street, Salem's housing stock becomes further depleted thereby increasing the competition and cost of remaining available housing units...."
 - "We believe that there are numerous traffic flow and parking concerns associated with operating a 12-guest short-term lodging unit in a family-oriented neighborhood with an existing shortage of off-street and on-street parking." The letter expressed concern that 3 of the 5 cars in the off-street parking at 82 Federal Street "must park tandemly," which "requires cars to back out into Federal Street thereby holding up the traffic flow going west on Federal Street," which "normally gets a lot of traffic going west from Route 114 (North Street)."
 - "One of the key requirements for obtaining a Special Permit is whether or not a project or endeavor fits and enhances the character of its surrounding neighborhood. The Federal Street Neighborhood is zoned as a 2-family district. There are no other non-owner short-term lodging facilities on Federal Street, between North and Boston Streets. Such a lodging house exposes a family-oriented neighborhood to transient neighbors with unpredictable behavior. It would be fair to say, that most people purchasing a home to live in would not like to live next door to a non-owner occupied, short-term rental for 12 transient guests... a non-owner occupied short-term lodging house has the potential to reduce the assessed and rental values of nearby residential properties."
43. Attorney Calabrese stated that nuisance laws are a protection for neighbors on issues such as noise. He stated that they would be willing to accept a reasonable restriction on this proposal and others for music, lighting, and noise, which would eliminate a big part of the nuisance problem. He added that they would be more than willing to come back and sit with the Solicitor if that helps the Board, but he does not know if they will take a position.

44. Chair Duffy asked about the space provided for parking. Ms. DiMare responded that there are three spots in tandem, that renters are encouraged to use the nearby parking garage, and that they are told that there is no on-street parking for guests. Ms. DiMare noted that there are quiet hours after 11 pm and before 7 am. Ms. DiMare added that she has given her card to abutters to say if there are any issues, call her.
45. Chair Duffy stated that there is not an actual, “consummated” rental usage. He stated that he would feel more comfortable to have a direct answer back (from the City Solicitor’s Office) that the issue was looked at and it does or does not change the analysis.
46. Mr. Viccica stated that they asked the question, and that the answer was that this Board needs to be able to determine what “engaged” is and “engaged” has been. Mr. Viccica stated that his understanding is that there was no question that this residence was not actually rented prior to the filing date. Mr. Viccica stated that he understood that there was an argument to be made, but that the relevant point is that this was not used as a (non-owner occupied) short-term rental before July 19, 2018, and the petitioner says so. Mr. Viccica states that he thinks that on that basis, the Board has been quite constant. Mr. Viccica suggested that the Board should find that the petitioner was not engaged in the short-term rental of the property as of the date the ordinance was filed. He added that he does not need the City Solicitor to weigh in on whether or not the argument should be considered.
47. Board member Jimmy Tsitsinos stated that he agreed with Mr. Viccica, and that he would be backing the Federal Street neighborhood.

The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearing, and after thorough review of the petition, including the application narrative and the Petitioner’s presentation and public testimony, makes the following **finding**:

The petitioner was not engaged in the short-term rental of the property as of the date the Ordinance was filed.

On the basis of the above statements of fact and finding, the Salem Board of Appeals voted none (0) in favor and four (4) opposed (Mike Duffy (Chair), Jimmi Heiserman, Jimmy Tsitsinos, and Paul Viccica) to grant the requested Special Permit per Section 15-6 (d) of the Salem Code of Ordinances to allow the continued operation of one non-owner occupied short-term rental unit in the two-family house at **82 Federal Street, Unit 2**. As such, the request for a special permit was **denied**.



Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.